ESSO PETROLEUM MALAYSIA INC.

v.

KAGO PETROLEUM SDN. BHD.

SUPREME COURT, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN CJ (MALAYA)
DATO' PEH SWEE CHIN SCJ
DATO' MOHAMED DZAIDDIN BIN HAJI ABDULLAH SCJ
[CIVIL APPEAL NO. 02-731-1993]
19 DECEMBER 1994

***CONTRACT**: Performance bonds - Whether pure on-demand letters of guarantee - Letter of demand - Letter of demand conformed generally to wordings of bonds - Validity - Whether sufficiently compliant.*

***INJUNCTION**: Interlocutory injunction granted against appellant restraining payment on on-demand performance bonds - Whether to be discharged - Balance of convenience - Whether tilted against the respondent - Trial Court relying on American Cynamid v Ethicon (1975) AC 396 in exercising discretion to grant injunction - Whether proper.*

The appellant entered into an agreement with the respondent to purchase piping materials from the latter. The goods were to be delivered on certain specified dates and time was of the essence. The parties agreed that any delay in delivery would entitle the appellant to make deductions on the payments due to the respondent, based on the cost-impact of such delay. The appellant however agreed to refund the respondent in case of over deductions.

However, as separate and staggered ascertainments of the sum to be refunded were complicated, the appellant agreed to pay the respondent the lump amount of such deductions, on the respondent executing performance bonds in their favour. In the event DM 482,202 was released by the appellant in exchange for two performance bonds worth DM 484,202, issued by Bank Bumiputra Malaysia Berhad (BBMB) on behalf of the respondent.

The appellant subsequently ascertained the cost impact and found that damages for the delay amounted to 90% of the sum stated in the performance bonds. They then demanded payment of this sum from the respondent and failing that, on 11 October 1993, called for the release of the bonds by BBMB. However before BBMB could release the money, the respondent obtained an interim injunction restraining the appellant from receiving any sum under the said bonds. The appellant was unsuccessful in their application to the High Court to set aside the injunction and hence the present appeal.

Before the Supreme Court the primary issues that arose were:

1. Whether the performance bonds in question were in fact pure on-demand letters of guarantee, and if so whether the appellant's letter of 11 October 1993 constituted a sufficient demand for the bonds.
2. Whether the interlocutory injunction was improperly granted and ought therefore to be discharged.

Held:

[1] The performance bonds here were in fact pure on-demand letters of guarantee, and all that was required to trigger them was a demand in writing by the beneficiary thereof. This being the case it would make the bonds independent from any conditions, including any underlying contract between the appellant and the respondent. It was thus not open for the learned Judge to impart into these on-demand guarantees, by implication, a requirement to have regard to, or to inquire into any breach of such underlying contract, and this seemed to have been done.

[2] There was nothing in the demand letter dated 11 October 1993 that could suggest that the demand was not proper or not properly worded. The words used in the said letter, albeit a little verbose, generally conformed to the wording used in the bonds and hence were sufficiently compliant. BBMB should therefore unquestionably pay the appellant on such demand, there being no allegation of fraud, let alone evidence of it.

[3] The interlocutory injunction herein, in the circumstances, should have been discharged by the learned Judge. The remedy of the respondent would clearly be in damages, which the appellant would undoubtedly be able to pay they being owned by one of the world's largest multinational companies. On the other hand there was some doubt as to whether the respondent could financially pay the damages given under a usual undertaking to pay damages on an injunction being guaranteed. The balance of convenience thus tipped heavily against the respondent.

[4] However, while agreeing that the interlocutory injunction granted *ex-parte* and continued *inter-partes* herein should have been discharged, to say that *American Cynamid* could not be considered by the Court in exercising its discretion whether to grant or withhold such an injunction in regard to a bank guarantee, is wide off the mark. Except in the case of a few exceptions which did not apply to the instant appeal, *American Cynamid* would clearly apply to all interlocutory injunctions.

[Appeal allowed]

[**Bahasa Malaysia** Translation of Headnote]

***KONTRAK**: Bon pelaksanaan - Sama ada sebenarnya surat jaminan atas-tuntutan - Surat tuntutan - Surat tuntutan mematuhi secara amnya perkataan-perkataan bon - Keesahan - Sama ada pematuhan mencukupi.*

***INJUNKSI**: Injunksi interlokutori diberikan terhadap perayu menegah bayaran ke atas bon-bon pelaksanaan atas-tuntutan - Sama ada harus dilepaskan - Imbangan keselesaan - Sama ada memihak kepada responden - Mahkamah perbicaraan bergantung pada American Cynamid lwn. Ethicon [1975] AC 396 dalam melaksanakan budibicara untuk memberikan injunksi - Sama ada wajar.*

Perayu telah memasuki satu perjanjian dengan responden untuk membeli bahan-bahan perpaipan daripada responden. Barangan-barangan tersebut perlu dihantarserah pada tarikh-tarikh yang tertentu dan masa merupakan intipati. Pihak-pihak tersebut telah bersetuju bahawa apa-apa kelewatan dalam penghantarserahan akan membolehkan perayu membuat penolakan ke atas bayaran-bayaran yang kena di bayar kepada responden, berdasarkan kepada kesan kos bagi kelewatan tersebut. Perayu bagaimanapun bersetuju untuk membayar balik responden sekiranya terdapat penolakan berlebihan.

Oleh kerana penentuan jumlah bayaran balik secara berasingan dan tidak serentak adalah rumit, perayu telah bersetuju untuk membayar jumlah pukal bagi penolakan-penolakan yang sedemikian,

jika responden menyempurnakan bon pelaksanaan atas nama mereka. Dengan itu DM482,202 telah dilepaskan oleh perayu sebagai ganti bagi dua bon pelaksanaan bernilai DM484,202, yang telah dikeluarkan oleh Bank Bumiputra Malaysia Berhad (BBMB) bagi pihak responden.

Berikutannya perayu telah menentukan kesan kos dan mendapati bahawa gantirugi bagi kelewatan tersebut mencecah kepada 90% jumlah yang dinyatakan dalam bon pelaksanaan. Mereka kemudiannya menuntut pembayaran bagi jumlah ini daripada responden dan apabila gagal, pada 11 Oktober 1993, telah menuntut pelepasan bon-bon tersebut oleh BBMB. Walaubagaimanapun, sebelum BBMB dapat melepaskan wang tersebut, responden telah mendapatkan satu injunksi interim, menegah perayu daripada menerima apa-apa jumlah di bawah bon-bon tersebut.

Perayu telah tidak berjaya dalam permohonan mereka kepada Mahkamah Tinggi untuk mengenepikan injunksi tersebut dan dengan itu membuat rayuan ini.

Di hadapan Mahkamah Agung isu-isu utama yang timbul adalah:

1. Sama ada bon-bon pelaksanaan yang dipersoalkan adalah pada hakikatnya surat-surat jaminan atas-tuntutan, dan jika demikian, sama ada surat perayu bertarikh 11 Oktober 1993 merupakan tuntutan yang mencukupi.

2. Sama ada injunksi interlokutori tersebut telah diberikan secara tidak wajar dan seharusnya dilepaskan.

Diputuskan:

[1] Bon-bon pelaksanaan di sini adalah pada hakikatnya surat-surat jaminan atas-tuntutan, dan apa yang diperlukan untuk menggerakkannya adalah tuntutan bertulis oleh benefisiarinya. Oleh hal yang demikian bon tersebut adalah bebas daripada sebarang syarat, termasuk apa-apa kontrak yang terselindung antara perayu dan responden. Dengan itu adalah tidak kena bagi Tuan Hakim yang bijaksana untuk meletakkan ke dalam jaminan-jaminan atas-tuntutan ini, melalui implikasi, syarat untuk mengambil kira atau melihat samada berlaku kemungkiran kepada kontrak yang terselindung tersebut, dan ini nampaknya telah dilakukan.

[2] Tidak terdapat apa-apa dalam surat bertarikh 11 Oktober 1993 yang boleh menyarankan bahawa tuntutan tersebut tidak teratur atau tidak diperkatakan dengan betul. Perkataan-perkataan yang digunakan dalam surat tersebut, sungguhpun agak panjang lebar, secara amnya menuruti perkataan-perkataan yang digunakan dalam bon-bon dan dengan itu telah mematuhi bon-bon dengan secukupnya. BBMB seharusnya dengan itu membayar perayu tanpa soal ke atas tuntutan yang sedemikian memandangkan tidak terdapat dakwaan fraud, mahupun keterangan mengenainya.

[3] Injunksi interlokutori di sini, dalam halkeadaan yang wujud, seharusnya sudah boleh diketepikan oleh Tuan Hakim yang bijaksana. Remedi responden adalah jelas dalam bentuk gantirugi, yang mana , tanpa diragui, akan mampu dibayar oleh perayu memandangkan perayu dimilikki oleh salah satu daripada syarikat antarabangsa yang terbesar di dunia. Sebaliknya terdapat beberapa keraguan sama responden dari segi kewangan dapat membayar ganti rugi sebagaimana yang biasanya diakujanji sebagai jaminan bagi satu injunksi. Imbangan keselesaan dengan itu lebih memihak kepada responden.

[4] Walaubagaimanapun, sementara menyetujui bahawa injunksi interlokutori yang telah diberikan *ex-parte* dan diteruskan *inter-parte* di sini seharusnya sepatutnya diketepikan, untuk menyatakan bahawa *American Cynamid* tidak dapat dipertimbangkan oleh Mahkamah dalam melaksanakan budibicaranya, sama ada untuk memberikan atau menahan injunksi sedemikian berhubung dengan gerenti bank, adalah tidak tepat. Melainkan dalam beberapa kes terkecuali yang tidak terpakai kepada rayuan semasa ini, *American Cynamid* adalah terpakai bagi semua injunksi interlokutori.

[Rayuan dibenarkan].

Cases referred to:
Harbottle v. National Westminster Bank [1978] 1 QB 146
Edward Owen v. Barclays Bank [1978] 1 QB 159
IE Contractors Ltd. v. Llyods Bank plc and Rafidain Bank [1991] 51 Build LR 1 [1990] 2 Llyod's Rep 496
American Cynamid v. Ethicon [1975] AC 396

Legislation referred to:
Contracts Act 1950, s. 56(3)

Other source referred to:
The Current Law by Professor Vincent Powell - Smith [1992] 2 MLJ 1

For the appellant - Rajendra Navaratnam(Conrad Young with him); M/s Azman Davidson & Co.
For the respondent - Shahabudin bin Shaik Alaudin; M/s Kamaruddin & Co.

JUDGMENT

Peh Swee Chin SCJ:
We are not going to write a judgment on this case, but at the conclusion of hearing of it, learned Counsel for the appellant seemed to have made a somewhat impassioned plea for it. We have decided to accede to it and we hereby do so.

This case raised the question of what is known as a performance bond in relation to an interlocutory injunction to prevent a call or demand on such performance bond. A brief summary of facts is necessary and is set out below.

The facts not in dispute were that the appellant, Esso Petroleum Malaysia Inc., (hereinafter called the buyer) had obtained a contract from Petroliam Nasional Bhd. to construct some plant called a slugcatcher for which certain pipes and piping materials were required by a contractor employed by the buyer to build the said plant. The buyer then agreed with the respondent, Kago Petroliam Sdn. Bhd., (hereafter called the seller), for the latter to sell and deliver such pipes and materials, (hereinafter called the said goods), from time to time on certain specified dates, to the buyer for the use of the said contractor. Such specified dates were regarded by both parties as important, especially for the buyer so that the buyer would be able to comply with the contractual obligations to both the said contractor and also to the said Petroliam Nasional Bhd. Such purchases from time to time of the said goods from the seller by the buyer were initiated and evidenced by separate documentation comprising the details and dates of requirement of the said goods in documents called "local purchase orders" with an appendix of same terms and conditions of purchase attached in every case to each of these local purchase orders, (hereafter called local purchase orders). The said local purchase orders were long documents, and for the purpose of this judgment, it would only be necessary to set out cl. 9.0 of the said terms and conditions of the said local purchase orders:-

> 9.0 **Delivery**
>
> 9.1 Time is the essence of this purchase order. Seller shall deliver the Materials/Equipment within the scheduled delivery period specified in this purchase order.
>
> 9.2 If SELLER fails to deliver the Materials/Equipment within the scheduled delivery periods specified in this purchase order and EPMI elects not to terminate this purchase order pursuant to Art. 10.1, it is agreed that as damages to EPMI for such delay, in the absence of legal ground and justification, the value of this purchase order shall be reduced by an amount equal to one percent (1%) of the value of this purchase order for each week or part thereof of delay in the delivery of any or all of the Materials/Equipment. The maximum amount that

can be deducted for liquidated damages is ten percent (10%) of the value of this purchase order. Any liquidated damages due to EPMI as provided in this article shall be deducted from payments due to Seller.

In accordance with the said cl. 9, whenever the seller delayed in the delivery of the said goods as ordered, deductions were made by the buyer from the payment due to the seller as damages.

The buyer agreed however, by way of purported indulgence to the seller, to refund a balance of such deductions in the event of "cost impact" found to be less or none in regard such damages deducted after such cost impact was ascertained by the buyer.

Such refund being dependent on the ascertainment of such cost impact; such ascertainment would in turn depend on the completion of the said slugcatcher and the receipt of claims from the said contractor for delay against the buyer. Such ascertainment was found to be more complex than it was anticipated, and the said refund of any balance of such amount of deductions as damages for delay could take time.

Therefore at the seller's request, at a meeting between the parties herein, the buyer agreed to release and pay to the seller the total amount of such deductions in exchange for letters of guarantee. A total amount of German Marks, *viz*. DM482,202 was released in exchange for two letters of guarantee, (hereafter called the performance bonds), which were issued by Bank Bumiputra Malaysia Bhd. and both dated 2 November 1992 for the sums of DM466,562 and DM17,640 respectively, totalling DM484,202 which was released. The two performance bonds were identical except for the different sums guaranteed and the different guarantee numbers used for identification purpose. It is therefore sufficient to set out below one of the said two performance bonds:

Bank Bumiputra Malaysia Berhad

BBMB BG No. 065-92-106

Date: 2nd November 1992

Esso Production Malaysia Incorporated
P O Box 10857
50728 Kuala Lumpur

Dear Sir

Re: **Bank Guarantee No. 065-92-106 for DM466,562.00**

In consideration of Esso Production Malaysia Inc. (EPMI) agreeing to release to Perbadanan Ladang-Ladang Tabung Haji Sdn. Bhd. (PLLTH) the sum of DM466,562 (Four hundred sixty six five hundred sixty two only) being the amount of liquidated damages (L/D) presently withheld by EPMI pursuant to several purchase Orders made between EPMI and PLLTH, we hereby Unconditionally and Irrevocably guarantee the payment to EPMI, the Ringgit equivalent of the sum of DM466.562 (Four hundred sixty six five hundred two only).

This Guarantee shall be effective from 15 October 1992 and shall remain valid, binding and in force for a period of 12 (twelve) months from the effective date. All claims, if any in respect of or under this Guarantee must be made in writing and received by us at any time on or before to the expiry of this Guarantee.

This Guarantee shall be governed by and construed in all respects in accordance with the Laws of Malaysia and the parties hereto hereby submit to the jurisdiction of the Courts of Malaysia in all matters connected with our obligations.

In compliance with Malaysian Exchange Control Act the Guarantor shall pay any claim in Malaysian Ringgit equivalent to Deutsche Marks at our current rate on the day the payment on the claim is made.

Yours faithfully
for Bank Bumiputra Malaysia Berhad
Putra World Trade Centre Branch
signed
(Authorised Signatories)

It did not seem to be disputed that the buyer on its part, unilaterally, by 1 October 1993 had ascertained the cost impact of the delays and faxed a letter of the same date to the seller stating that it had concluded that damages for the delay had come to 90% of the total sum of $484,202, the latter sum being the total sum released to the seller by the buyer in exchange of the 2 performance bonds in question. The buyer requested for payment of the sum representing 90% of the said RM484,202 within 7 days. The payment was not so made within such 7 days, but instead on 6 October 1993, the seller wrote to the buyer for all particulars justifying the claim of the said 90%. Without replying, the buyer called on the performance bonds by letter dated 11 October 1993 addressed to Bank Bumiputra Malaysia Bhd. This letter being a call or demand on the performance bonds is set out below:

Esso Production Malaysia Inc.
P O Box 10857, 50728 Kuala Lumpur, Malaysia

11 October 1993

Bank Bumiputra Malaysia Bhd
Putra World Trade Centre
Level 2 Block Podium
Jalan Tun Ismail
50490 Kuala Lumpur

Attention: Cik Normelry Atan

Dear Sir

We refer to the Bank Gurantees no. 000065-92-106(BG"A) and 065-92-107(BG"B") both dated 2 November 1992, for DM466,562 and DM17,640, respectively. The Bank Gurantees were issued by Bank Bumiputra Bhd in favour of Esso Production Malaysia Inc (EPMI) in respect of several purchase orders made between EPMI and Kago Petroleum Sdn. Bhd. (KAGO).

Pursuant to the Bank Gurantees, we hereby exercise our rights to claim the whole of the sum of DM17,640 from BG"B" and the sum of DM418,141.80 from BG"A" above. The total sum payable by your bank to EPMI is DM435,781.80. We do hereby give you notice of our demand for the immediate payment of the said sum of DM435,781.80.

Please remit the claimed bank guarantee amount of DM435,781.80 in equivalent Ringgit Malaysia by interbank transfer to United Malayan Banking Corporation Berhad, Jalan Sultan Sulaiman, Kuala Lumpur for the credit of Esso Production Malaysia Inc, account no. 0135-10260-1.

We have attached copies of the above bank guarantee for your reference. We will return the originals when our account has been credited.

Should you require any further information, please call Robert Yap at telephone No. 2403064.

Please acknowledge receipt of our claim by signing and returning the duplicate copy of this demand letter to our bearer.

Very truly yours.
Sg.
Lam Fook Keong
Treasurer

The said Bank Bumiputra Malaysia Bhd. in response to the call on the performance bonds, wrote to the seller on 12 October 1993 asking the seller to give reasons within 7 days why the said Bank should not accede to the demand; without replying also, the seller filed the civil suit concerned herein and obtained an *ex-parte* injunction on 18 October 1993 restraining the buyer, its agents or servants from receiving the said total sum of DM484,202 or any part thereof under the said 2 performance bonds. On 23 October 1993, the buyer applied to set aside the injunction etc, and on 15 December 1994, the buyer's application was dismissed with costs and the injunction was upheld or continued, hence the appeal to the Supreme Court (now Federal Court).

The delays were admitted but the seller made a bare statement that such delays were caused by the buyer's or its agent's refusal to accept the said goods on various grounds which the buyer did not disclose to the seller. However, the seller had delivered all the said goods as ordered [*vide* affidavit of Nori Abdul Rahman (undated) at page 70 of the Appeal Record]. The refusal to accept was denied by the buyer (*vide* affidavit of Puan Sri Junaida bt Mohd Said dated 22 October 1993).

The seller had stated two or possibly three grounds against the said call on the performance bonds, but only two grounds were pressed in argument. The 1st ground of the seller was that, such delays were caused by the refusal of the buyer itself to accept the said goods on those occasions in question on various grounds about which the buyer did not tell the seller.

The 2nd ground was a legal one that if the seller accepted the said goods delivered later and not on time, the buyer had not, at the time of acceptance of delayed goods, indicated its intention to the seller that the buyer would claim damages. This had obvious reference to s. 56(3) of the Contracts Act 1950, which is set out below:

Sec 56(3)

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

At the conclusion of the argument, we allowed the appeal of the buyer by setting aside the interlocutory injunction granted by the learned Judge. We continue with our reasons therefor.

It is obvious that the word "bond" is a loose, general term, used also to include a group of documents or legal instruments such as a contract of guarantee, or of indemnity or an undertaking to pay. Any attributive word before the word "bond" usually refers to the purpose of the bond such as tender bonds, performance bonds etc. Performance bonds are almost invariably contracts of guarantee and so named presumably to give that extra air of solemnity.

Conventional wisdom has it that in the world of commerce, trustworthiness is a byword for doing business and a performance bond thus plays a crucial role causing more business to be formed and to be transacted. In our view, Kerr J put it very well in *Harbottle v. National Westminster Bank* [1978] 1 QB 146 by stating:

> It is only in exceptional cases that the Courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contract. The Courts are not concerned with the difficulties to enforce such claims; these are risks which the merchants take.

Lord Denning in *Edward Owen v. Barclays Bank* [1978] 1 QB 159 went so far as to say:"...these performance guarantees are virtually promissory notes payable on demand" and approximated them as letters of credit. Lord Denning's description has of course since come in for a great deal of flak from a good number of people, including academics, justifiably or unjustifiably. We endorse fully however the view of an eminent local academic that the said description could have served to cloud the real issue - which is one of contractual interpretation of a performance bond and not of the nature of transaction "**Calls on Performance Bonds in Malaysia - The Current Law**" by Professor Vincent Powell -Smith [1992] 2 MLJ 1.

That the real issue of a performance bond is one of contractual interpretation was the unanimous view of three Judges in the Court of Appeal in *IE Contractors Ltd. v. Llyods Bank plc and Rafidain Bank* [1991] 51 Build LR 1 [1990] 2 Llyod's Rep 496. It is not our intention to write an essay on performance bonds, in the instant appeal, except to repeat that it "involves a straightforward exercise of construction, or interpretation of the bond to discover the intention of the parties"- per Sir Deny Buckley in IE Contractors at page 503, *ibid.*

Looking at the performance bond (Bank Guarantee no. 065-92-106), as set out above, it was stated to be an "unconditional" guarantee. The only other thing of note would be the stated requirement that all claims must be made in writing. This performance bond was on a true construction, a pure on-demand guarantee, and all that was required to trigger it was a demand in writing. It would not be dependent or conditional on the production of a document, e.g. a certificate from some nominated independent person like an architect as in some building contracts etc. Neither was it worded to make it conditional for Bank Bumiputra, the issuer of the performance bond to inquire into the existence or otherwise of any breach of any contractual obligation between the beneficiary of the bond, i.e. the buyer in this case and the seller, at the behest of the latter itself, the performance was issued. It was not even worded to make it conditional on a simple declaration by the beneficiary, without proof to its issuer, that the seller had not paid damages to the buyer after the release by the buyer of the sum DM466,562. In fact, the present performance bond, had it been worded e.g. to require any proof of breach by the buyer so as to deserve any payment, then in such event, it commercial acceptability as a performance bond, would be mostly lost.

Dealing further with the construction of the performance bond, since we found it was an on-demand performance bond, this would, in view, make the present performance bonds independent from any underlying contract i.e. any contract between the buyer and the seller. We thought there therefore, it was not open to his Lordship in the Court below to impart into this on-demand guarantee, by implication, a requirement to have regard to, or to inquire

into any breach of any obligation of such underlying contract, and this seemed to have been done. The next and only other question from the instant performance bonds would be as to what sort of demand it would be as required by its wording.

One therefore looked at the letter dated 11 October 1993 as set out above which was supposed to trigger the operation of the instant performance bonds. There was nothing there that could suggest that the demand was not proper, and for complying with the simple words there of making a claim by "a demand in writing", the said letter was sufficiently compliant even though it was verbose.

In the Court of the first instance of the *IE Contractors* [1989] 2, Lloyd's Rep. 205 Leggatt J held that the demand made to Rafidain Bank was invalid, *inter alia*, for not stating that the demand was "for damages etc" as set out in the bond therein, but the Court of Appeal, (Staughton and Purchase LJJ and Sir Denys Buckley), in *IE Contractor*s [1990] 2 Lloyd's Rep. 496 declined to adopt such a requirement of strict compliance with the words and that notwithstanding that the precise words of "for damages etc" were not used, a valid demand was made. We wish to associate ourselves with that rather common-sense approach. If words are in apparent conformity with the wording in any particular bond, they are sufficient.

On the type of such pure on-demand performance bond its issuer should unquestionably pay on demand except in the case of fraud. Any argument of immediate disadvantage to the party who caused such a document to be in use is of no avail to the party who must face the risks of such unquestioned payment except where there is fraud; there was even no allegation of it, let alone any evidence on it.

Learned Counsel for the appellant was at some pains to impress on us that the injunction should not have been granted by the lower Court in the first place to restrain the buyer from receiving any sum of money under the two performance bonds in question on the ground that *American Cynamid v. Ethicon* [1975] AC 396 had no application in a situation of restraint of payment on a bank guarantee.

While agreeing that the interlocutory *ex-parte* injunction granted herein in the circumstances of this instant appeal should have been discharged by the learned Judge, to say that *American Cynamid* could not be considered in exercising any discretion in granting or withholding such an interlocutory injunction in regard to a bank guarantee was wide off the mark. Except in the case of a few exceptions which did not apply to the instant appeal, *American Cynamid* would apply to all interlocutory an interlocutory injunction could arise out of such alleged invasion of the right of the seller ie. the plaintiff, by the buyer ie., the defendant under the said contracts between the seller and the buyer. Therefore, despite the resulting effect that it would restrain Bank Bumiputra, it could not prevent the seller from applying for an interlocutory injunction.

In considering the seller's application for an interlocutory injunction and applying *American Cynamid*; without the need to ascertain the respective strength of the respective cases of the respective parties herein at this stage, the seller had alleged a breach of contracts ie. the buyer's presumably repeated refusal to accept the said goods; and the legal failure by the buyer to notify its intention to the seller of claiming damages when buyer had accepted the said goods out of time while time had been earlier agreed to be of the essence. The seller had given in turn the answers to all these. These were serious questions for trial and even though they were not that serious, but nonetheless they could not be described as frivolous or vexatious.

Next, the question of balance of convenience would fall for consideration. The first of the principles applicable in regard thereto would be that essentially the remedy of the seller as plaintiff would be in damages and the buyer would undoubtedly be able to pay; the buyers being owned, either directly or ultimately, by one of the world's largest multinational companies. Having sought the release of deductions by the buyer earlier, and offering in exchange bank guarantee ie. performance bonds, one could infer therefrom some liquidity problem of the seller, and in the absence of anything else, there was some doubt as to whether the seller could financially pay the damages given under a usual undertaking to pay damages on an injunction being guaranteed. While considering other factors in conjunction with what has been stated above, there was a special one among them, ie. performance bonds of the present sort were involved here. A performance bond, like a pure on-demand guarantee in the instant appeal, has always occupied an important place in the national or international world of commerce. It will be remembered that Lord Diplock in the *American Cynamid* had alluded to special factors to be taken into consideration in the particular circumstances of individual cases. We therefore, in the end, found the balance of convenience tipped heavily against the seller, and we unanimously agreed that the interlocutory injunction granted *ex parte* and continued *inter partes* by the learned Judge in favour of the seller, should be discharged, hence the appeal was allowed.

For the reasons given we allowed the appeal with costs here and below, and set aside the interlocutory injunction restraining the making of a call on the performance bonds. The deposit in Court was to be refunded to the appellant.